82-1201

No. 82-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

DAVID C. BINTLIFF,

Cross-Petitioner,

v.

CHEMETRON CORPORATION,

Cross-Respondent.

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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January 15, 1983

QUESTION PRESENTED

Can findings of fact provide a basis for collateral estoppel in subsequent litigation when no judgment was ever entered on the basis of those findings and the findings were expressly withdrawn by the trial court?

PARTIES TO THE PROCEEDING BELOW

Parties to the proceeding in the United States Court of Appeals for the Fifth Circuit were Chemetron Corporation, Business Funds, Inc., the Estate of John F. Austin, Jr., and David C. Bintliff.

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No. 82-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

DAVID C. BINTLIFF,

Cross-Petitioner,

v.

CHEMETRON CORPORATION,

Cross-Respondent.

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Cross-Petitioner, David C. Bintliff, respectfully prays that, if the petition of Chemetron Corporation for a writ of certiorari is granted, the writ of certiorari issued include review of the lower court's holding on the issue of offensive collateral estoppel against David C. Bintliff.

OPINION BELOW

The opinion of the Court of Appeals has been reported at 682 F.2d 1149 (5th Cir. 1982), and is included in the Appendix to the Petition for Writ of Certiorari of Chemetron Corporation. [A1-A111] The issue raised by the present Cross-Petition is discussed by the majority, 682 F.2d at 1187-92, A76-A86; and by Judge Reavley, dissenting, *id.* at 1200-03, A105-A111. The final judgment and the orders in connection with post-trial motions by the District Court for the Southern District of Texas are not officially reported and are included in the Appendix of Chemetron Corporation. [B1-B28]

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on August 16, 1982. A timely Petition for Rehearing and a parallel Suggestion for Rehearing En Banc filed by Chemetron Corporation were denied on September 20, 1982. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1976). The Petition for Writ of Certiorari of Chemetron Corporation, No. 82-999, was received on December 17, 1982 and this Conditional Cross-Petition is timely filed under SUP. CT. R. 19.5.

STATEMENT OF THE CASE

Prior to trial in this cause Chemetron urged the district court to hold that Bintliff was collaterally estopped from relitigating certain factual issues that had allegedly been determined in *Cosmos Bank* v. *Bintliff*, C.A. No. 67-H-590 (S.D. Tex. 1975), another case that had arisen out of the Westec collapse. In *Cosmos Bank*, the district court, after a bench trial, entered a "Memorandum and Order" which set forth findings of fact and conclusions of law.[1]

Subsequently, Cosmos Bank moved for entry of judgment, which prompted a motion in opposition to entry of judgment by Bintliff. Prior to any action by the district court upon the motions, Bintliff's counsel advised the clerk of the court by letter that Bintliff and Cosmos Bank had reached a settlement contingent upon the court's entry of a formal order protecting Bintliff against any possible preclusive effects of the judge's findings and conclusions. Although the *Cosmos Bank* trial judge declined to sign a proposed joint order granting a new trial, he instead entered an order dismissing the case with prejudice and

[1] The findings involved a multiplicity of legal theories that are not at issue here.

expressly withdrawing and setting aside the findings of fact and conclusions of law that he had previously made.[2]

Based upon these facts, the district court below in this case rejected Chemetron's attempt to estop Bintliff from relitigating issues allegedly decided in the withdrawn findings in *Cosmos Bank*.[3] The case was then tried to a jury and judgment was entered under Rule 10b-5 and under TEX. REV. CIV. STAT. ANN. art. 4004 (Vernon 1966) against three of the defendants, including Bintliff, jointly and severally. When this judgment was reversed by the Court of Appeals on other grounds, the Court of Appeals reached Chemetron's conditional cross-appeal on collateral estoppel and a divided court held that the district court had erred in failing to estop Bintliff from relitigating issues of fact that had been "determined" by the withdrawn *Cosmos Bank* findings. 682 F.2d at 1187-92, A76-A86. Judge Reavley, in dissent, characterized the holding as one that "ignores settled principles of preclusion, overrules Fifth Circuit precedent, and undermines the strong public interest in the settlement of lawsuits." *Id.* at 1200, A105.

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[2] The trial judge had simply adopted the findings submitted by the plaintiff. He later entered an order striking the word "proposed" at the places where it appeared in the order he had signed. The value of "findings" made in this manner has long been criticized by this Court. *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 656-57 (1964).

[3] Chemetron filed a motion to collaterally estop Bintliff on September 29, 1979. This motion was denied by an order dated October 9, 1979. A copy of this order is included in the Appendix to this Conditional Cross-Petition. [AA1.]

Jurisdiction in the district court was based upon 28 U.S.C. §1331(a) (1976). *See* SUP. CT. R. 21.1(i).

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW ERRONEOUSLY APPLIED COLLATERAL ESTOPPEL ON THE BASIS OF WITHDRAWN FINDINGS OF FACT, CREATING GRAVE PROBLEMS FOR THE SETTLEMENT OF CASES AND THE EFFICIENT ADMINISTRATION OF JUSTICE.

This Court has recently spoken more than once on the importance of collateral estoppel — or "issue preclusion," as some now call it — as a doctrine designed to promote judicial economy by preventing needless litigation. *See Kremer* v. *Chemical Construction Corp.*, 102 S. Ct. 1883, 1890 n.6 (1982); *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 326 (1979); *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313, 328-29 (1971). These laudable goals can be achieved, however, only if the rules of collateral estoppel are, to the extent that the subject matter permits, fixed and known, and to the extent that the rules are calculated to discourage unnecessary litigation. The Fifth Circuit has departed from both of these limits by substituting its own novel rules of collateral estoppel and by devising rules that will encourage, not discourage, litigation.

The errors of the Fifth Circuit majority's analysis are persuasively demonstrated in Judge Reavley's dissent. 682 F.2d at 1200-03, A105-A111. The reasons for granting the writ may be summarily stated.

First, under the doctrine of collateral estoppel, a judgment on the merits in a prior suit bars relitigation of issues actually litigated and necessary to the outcome of the first action. *See Parklane Hosiery Co.* v. *Shore*, 439 U.S. at 326 n.5. A generally recognized prerequisite to the application of preclusive effects under this doctrine is that there must be a valid judicial determination from which preclusion flows. *See* RESTATEMENT

(SECOND) OF JUDGMENTS §27, Comment k (1982). The Court of Appeals in the present case, however, has departed from this tenet of collateral estoppel and has extended preclusive effect to findings of fact that were expressly withdrawn and set aside by the rendering court.[4]

There is, however, simply no prior decree from which collateral estoppel can flow against Bintliff. The only judicial decree in *Cosmos Bank* is the district court's order of dismissal with prejudice, which clearly was intended to avoid collateral estoppel effects. On being advised of the settlement, the district court stated, "I favor your agreement to settle and am willing to sign an order of dismissal that provides for withdrawal of my previous findings and conclusions. . . ." 682 F.2d at 1187 n.82, A77 n.82. The order entered by the court expressly provided that:

> IT IS ORDERED, ADJUDGED, AND DECREED that the above styled cause be and it is hereby dismissed with prejudice as to Defendants, David C. Bintliff, . . . and the findings of fact and conclusions of law heretofore entered by the Court in this cause be and the same is withdrawn and set aside.

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[4] The Fifth Circuit relied primarily upon cases principally from the Second Circuit in which courts recognized conclusive effects of prior judicial determinations, even though the prior determinations were not final for all purposes. 682 F.2d at 1190-91, A83-A84. The rationale of these cases is that once a factual determination has been made that is not tentative or likely to be reconsidered by the rendering court, that determination may be entitled to preclusive effect even if it were not encompassed by a final judgment. The recognition by these courts that the benefits served by collateral estoppel should not be stymied by the elevation of form over substance has been misused by the Court of Appeals' decision in the present case, however. The Fifth Circuit has lost sight of the fact that in these cases there were viable judicial decrees or factual determinations from which collateral estoppel could arise. Here the findings effectively were reconsidered and vacated by the trial court in light of the settlement.

Id. at 1188 n.83, A77-A78 n.83. The Fifth Circuit, therefore, has *sub rosa* vacated the judgment that was actually entered in *Cosmos Bank* and has acted on a hypothetical judgment it views as consistent with the withdrawn findings and conclusions. This it was not and should not be free to do.

Second, in order to apply collateral estoppel, the issues determined previously must have been necessary to the judgment entered. *See Allen* v. *McCurry*, 449 U.S. 90, 93-94 (1980); *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 326 n.5 (1979); *Norton* v. *Larney*, 266 U.S. 511, 517 (1925); RESTATEMENT (SECOND) OF JUDGMENTS § 27, Comment h (1982). Because no judgment was entered on the findings by the district court, one is at a loss to know which of the findings would have been necessary to a hypothetical judgment. Some findings upon which a judgment hypothetically could have been based would arguably support independent, alternative grounds that are not relevant in this case.

Thus, even had the settlement not been reached and the *Cosmos Bank* court had entered judgment against Bintliff, subsequent collateral estoppel would not have been appropriate. As this Court held in *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232 (1972), when the first judgment could have rested on grounds not relevant to the second case, there is no estoppel. To hold otherwise would put a party to an appeal of independent, alternative grounds or facts not necessary to the judgment merely to avoid collateral estoppel, even though other grounds of liability could clearly be sustained. *See Hicks* v. *Quaker Oats Co.*, 662 F.2d 1158 (5th Cir. 1981). Further, obtaining consideration on appeal of superfluous findings is problematical at best. Clearly, the very difficulty of applying traditional collateral estoppel rules to a hypothetical judgment demonstrates the lack of wisdom and predictability of such an approach.

Further, the Fifth Circuit's decision will serve only to increase uncertainty in the litigation of multi-issue cases. In ignoring the express decision by the *Cosmos Bank* court withdrawing and setting aside the findings of fact, the court below has left no basis for ascertaining what determinations of fact might or might not serve to preclude relitigation in a subsequent suit. The Fifth Circuit has deprived this area of the law of any certainty contrary to the dictates of *Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394 (1981), and turned on its head the policy behind collateral estoppel of encouraging reliance on prior adjudication. *See Allen* v. *McCurry*, 449 U.S. 90 (1980).

Third, this Court in *Parklane Hosiery Co.* v. *Shore* required that in applying collateral estoppel offensively care should be taken that the defendant had a prior full opportunity to litigate and that application of collateral estoppel would not be unfair. In this case, Bintliff, by settling, forewent his opportunity to fully litigate through appeal, *see* RESTATEMENT (SECOND) OF JUDGMENTS § 28, Comment a (1982), thus securing to the plaintiff and the judicial system the benefits of repose in *Cosmos Bank*. Now Bintliff, having relied upon the *Cosmos Bank* court's determination and general principles of collateral estoppel and settlement,[5] is deprived of the benefit of his reliance by the Fifth Circuit decision. In such a circumstance, collateral estoppel is neither foreseeable[6] nor equitable. Here the trial court in its broad discretion, *Parklane Hosiery Co.* v. *Shore*, 439 U.S. at 331, correctly concluded that offensive collateral estoppel should not be allowed; the Fifth Circuit's reversal of this decision was

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[5] *See* § 2 *infra* (settlement construed by parties' intent).

[6] The Fifth Circuit reasoned that because the existence of other cases was known to Bintliff at the time of the *Cosmos Bank* settlement, collateral estoppel was foreseeable. 682 F.2d at 1189, A80. It is not the existence of this case, but the unanticipated use of the withdrawn findings by the Fifth Circuit that is critical to the foreseeability requirement.

not only error,[7] but such a distortion of collateral estoppel principles as to interfere with the administration of justice in the federal courts.[8]

Fourth, the efficient administration of justice is threatened because the decision places a substantial and unwarranted burden on the settlement of cases, particularly complex, multi-issue cases. It is well recognized that settlements are favored and encouraged in the law. *Protective Committee* v. *Anderson*, 390 U.S. 414, 424 (1968).[9] The Fifth Circuit's decision will ensure

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[7] Should this Court affirm the Fifth Circuit's decision in *Huddleston* v. *Herman & MacLean*, 640 F.2d 534 (5th Cir.), *modified on denial of rehearing*, 650 F.2d 815 (5th Cir. 1981), *cert. granted*, 102 S. Ct. 1766 (1982), that a plaintiff must show a violation of Rule 10b-5 by clear and convincing evidence, and reverse the Fifth Circuit's holding below in this case that no Rule 10b-5 liability can be sustained, the collateral estoppel holding below becomes erroneous for yet another reason. Bintliff cannot be collaterally estopped by a previous finding in *Cosmos Bank* when plaintiff's burden would be higher in this case on remand. *Cf. Helvering* v. *Mitchell*, 303 U.S. 391 (1938) (different burden bars collateral estoppel).

[8] Moreover, the Fifth Circuit decision will engender inequitable treatment of plaintiffs and defendants. Although the Fifth Circuit apparently felt that it would be somehow unfair to allow Bintliff to settle and to avoid being collaterally estopped by the *Cosmos Bank* findings, FED R. CIV. P. 41(a) extends strikingly similar benefits to plaintiffs. Under the rule, plaintiff may take a voluntary dismissal of his action at any point in the trial proceedings with either leave of court or the agreement of all parties who had appeared in the case. Such a dismissal, unless otherwise stated in the order or stipulation, is without prejudice and prior determinations in the case have no collateral estoppel effect. *In re Piper Aircraft Distribution System Antitrust Litigation*, 551 F.2d 213, 219 (8th Cir. 1977). In fact, this Court has recognized that even a plaintiff whose jury verdict has been set aside on defendant's motion for judgment *n.o.v.* may ask the trial court for a voluntary dismissal in order to obtain another opportunity to fill the gap in his proof. *Neely* v. *Martin K. Eby Construction Co.*, 386 U.S. 317, 328 (1967). This situation, apparently not thought to create unfairness, is closely analogous to Bintliff's posture here — except that Bintliff secured the consent of both his adversary and the *Cosmos Bank* trial court prior to dismissal.

[9] The Fifth Circuit argued that the benefits of settlement were not

that judicial resources will be wasted because litigants will be unwilling to settle matters at risk of being collaterally estopped by all of the factual finding in the settled case (whether or not such findings would have been necessary to a judgment). Ironically, a doctrine designed to promote judicial economy by preventing needless litigation, *see Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 326 (1979); *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313, 328-29 (1971), will, as expanded by the Fifth Circuit, itself cause wasteful litigation. Because of its serious inhibition of settlements alone, the Fifth Circuit's opinion poses such a serious threat to the administration of justice that it should be reversed.

2. THE FIFTH CIRCUIT'S DECISION IS IN CONFLICT WITH THE DECISIONS OF THIS COURT AND THE COURTS OF APPEALS THAT THE PRECLUSIVE EFFECTS OF A SETTLEMENT SHOULD BE DETERMINED FROM THE PARTIES' INTENTIONS.

The Fifth Circuit's decision departs from the well-established doctrine that the preclusive effects of a settlement or consent decree must be determined from the intent of the parties. *See Lawlor* v. *National Screen Service Corp.*, 349 U.S. 322, 327 (1955); *Green* v. *Ancora-Citronelle Corp.*, 577 F.2d 1380, 1383 (9th Cir. 1978); *Brunswick Corp.* v. *Chrysler Corp.*, 408 F.2d 335, 337 (7th Cir. 1969). *See generally Kaspar Wire Works, Inc.* v. *Leco Engineering & Machine, Inc.*, 575 F.2d 530, 537-40 (5th Cir. 1978); RESTATEMENT (SECOND) OF JUDGMENTS § 27, Comment e (1982); 18 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE & PROCEDURE § 4443 at 384-88 (1981). In

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obtained in the *Cosmos Bank* case since the case was fully tried before settlement was reached. 682 F.2d at 1191 n.85, A82 n.85. The benefits to the judicial system and the parties of avoiding a lengthy appeal and possible retrial on remand cannot be so easily discounted. *See Associates Capital Services Corp.* v. *Loftin's Transfer & Storage Co.*, 554 F.2d 188, 189 (5th Cir. 1977).

the present case, it is clear from the recitation of the facts contained in the Fifth Circuit's opinion that the parties to the *Cosmos Bank* settlement clearly did not intend that the judgment would have collateral estoppel effects against Bintliff. In the letter advising the Clerk of the tentative settlement of the *Cosmos Bank* case, counsel for Bintliff stated, "[S]ettlement is, however, contingent on the Judge's entering a form of order which will protect Mr. Bintliff against the use of the Judge's findings and conclusions in other litigation." 682 F.2d at 1187 n.81, A76 n.81. It was in response to this condition that the *Cosmos Bank* court withdrew its findings.

As this Court held in *Lawlor* v. *National Screen Service Corp.*, 349 U.S. 322, 327 (1955), a consent judgment dismissing a suit with prejudice, if unaccompanied by findings, is normally not construed to bind the parties on any factual issue which might arise in connection with another cause of action. In the present case, the order of dismissal was unaccompanied by findings, and the findings which had previously been entered by the Court were expressly withdrawn. There can be no better evidence that the intent of the parties and of the trial court in the *Cosmos Bank* case was that the findings of fact would not have any preclusive effect on issues of fact arising out of another cause of action. The Fifth Circuit opinion in this case, however, ignores this clearly expressed intent of both the parties to the settlement and the trial court.

CONCLUSION

If a writ of certiorari is issued to review the judgment and the opinion of the Fifth Circuit at the instance of Chemetron Corporation, then the writ granted should include the issue raised in this Conditional Cross-Petition.

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January 15, 1983

CERTIFICATE OF SERVICE

Pursuant to SUP. CT. R. 28.5, I have served all parties required to be served with three copies of the foregoing Conditional Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit by placing in the United States mail, with first class postage prepaid and addressed to the following:

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Dated this 15th day of January 1983.

.....
HARRY M. REASONER

APPENDIX

Case No. 67-H-642

Chemetron Corp. v. Business Funds, Inc., et al.

ORDER

Plaintiff's Motion to Collaterally Estop David C. Bintliff From Relitigating Issues Previously Adjudicated and, in the Event of Denial of Such Motion, for Certification of Appealability of Such Denial Pursuant to 28 U.S.C. § 1292(b) is denied, as to collaterally estopping Bintliff and as to certification to the Fifth Circuit.

/s/ .....
CARL O. BUE, JR.
United States District Judge

Date: 10-9-79

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No. 82-1201

In The

Supreme Court of the United States

October Term, 1982

David C. Bintliff,
Cross-Petitioner,

v.

Chemetron Corporation,
Cross-Respondent.

BRIEF FOR CROSS-RESPONDENT IN OPPOSITION TO CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Should findings of fact, made after a fully and fairly litigated seven-week trial, provide the basis for collateral estoppel where prior to entry of formal judgment on such findings the party to be estopped settles the first action expressly to evade the effects of collateral estoppel?

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No. 82-1201

In The

Supreme Court of the United States

October Term, 1982

DAVID C. BINTLIFF,
Cross-Petitioner,

v.

CHEMETRON CORPORATION,
Cross-Respondent.

REPLY FOR CROSS-RESPONDENT IN OPPOSITION TO CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATEMENT OF THE CASE

Prior to trial in this case, Cross-Respondent, Chemetron Corporation,[1] moved that Cross-Petitioner Bintliff be collaterally estopped from relitigating certain factual issues adjudicated adversely to him in *Cosmos Bank v. Bintliff*, C.A. No. 67-H-590 (S.D. Tex. 1975). The trial court denied Chemetron's motion and Chemetron filed a cross-appeal. The Court of Appeals reversed and held Bintliff collaterally estopped from relitigating the particular facts on remand. *Chemetron Corp. v. Business Funds, Inc.*, 682 F.2d 1149, 1187-92 (5th Cir. 1982); A76-A86.

Cosmos Bank was another case arising out of the Westec stock scandal. On May 1, 1975, after a seven-week

1. *Rule 28.1 Statement:* Chemetron has one parent, Allegheny International, Inc. Its subsidiaries are all wholly owned.

non-jury trial in Houston, the district court entered a lengthy "Memorandum and Order" setting forth 221 findings of fact and 38 conclusions of law. Based on those findings and conclusions, judgment for over $700,000 was to be awarded plaintiff, Cosmos Bank, against Bintliff for violations of federal securities laws and common law fraud. Cosmos Bank filed its motion for judgment on May 9, 1975, and Bintliff filed his opposition on May 16, 1975. *Id.* at 1187-88; A76-A77.

On May 29, 1975, Bintliff's counsel wrote the United States District Clerk saying that Bintliff and Cosmos Bank would settle, but only if the trial judge would sign an order preventing the use of the extensive findings and conclusions in other litigation. *Id.* at 1187 n. 81; A76 n. 81. On May 30, Bintliff and Cosmos Bank filed a joint motion and proposed order of dismissal, which would have granted a new trial and set aside the findings and conclusions. The court refused to sign the proposed order because there was "no basis for a new trial." *Id.* at 1187 n. 82; A77 n. 82. The district court proposed a different order and stated that the court would act on plaintiff's pending motion for judgment unless the parties accepted the court's proposed order. The parties accepted and the court signed that order, which dismissed the case with prejudice and withdrew the findings and conclusions. *Id.* at 1187-88; A76-A77.

At trial in this case, Chemetron's proposed pretrial order contained 158 findings of fact applicable to its case taken from the 221 findings made by the *Cosmos Bank* court. However, the trial court in *Chemetron* refused to estop Bintliff from relitigating those facts. *Id.* at 1188; A77.

REASONS FOR DENYING THE WRIT

The issue raised by Bintliff's conditional cross-petition, simply put, is whether a litigant can evade the consequences of collateral estoppel by contriving a "settlement" after fully and fairly litigating factual issues and losing. The Court of Appeals held he could not:

> In this instance, the facts of Bintliff's activities found in *Cosmos Bank* have been found again by the jury in *Chemetron*. Thus, they have been twice fully litigated. That Judge Hannay felt he had rendered a fully litigated, fair and correct adjudication on the merits in *Cosmos Bank* is evidenced by his refusal to sign an order granting a new trial because such an order had "no basis" and by his threat to enter final judgment.
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> Tactically, he chose to litigate fully *Cosmos Bank*, risking an adverse decision. He lost on that risk, and only when he lost did he decide to settle, fearing offensive collateral estoppel. Yet now he seeks to avoid the consequences of that loss by elevating form over substance. He cannot have it both ways. The findings of fact against Bintliff in *Cosmos Bank* are sufficiently final to permit their use in this case. On remand, Bintliff should be collaterally estopped from relitigating those facts.

682 F.2d at 1191-92; A85-A86. The decision is limited to the peculiar facts of the *Cosmos Bank* situation. It presents no issue for certiorari. *See Restatement (Second) of Judgments* §13 and Comment g thereto (1982).

CONCLUSION

The conditional cross-petition for a writ of certiorari should be denied.

Respectfully submitted,

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